

respect to rights in technical data under a non-FAR agreement. The guidance shall—

“(1) establish criteria for defining the legitimate interests of the United States and the party concerned in technical data pertaining to an item or process to be developed under the agreement;

“(2) require that specific rights in technical data be established during agreement negotiations and be based upon negotiations between the United States and the potential party to the agreement, except in any case in which the Secretary of Defense determines, on the basis of criteria established in such policy guidance, that the establishment of rights during or through agreement negotiations would not be practicable; and

“(3) require the program manager for a major weapon system or an item of personnel protective equipment that is to be developed using a non-FAR agreement to assess the long-term technical data needs of such system or item.

“(b) REQUIREMENT TO INCLUDE PROVISIONS IN NON-FAR AGREEMENTS.—A non-FAR agreement shall contain appropriate provisions relating to rights in technical data consistent with the policy guidance issued pursuant to subsection (a).

“(c) DEFINITIONS.—In this section:

“(1) The term ‘non-FAR agreement’ means an agreement that is not subject to laws pursuant to which the Federal Acquisition Regulation is prescribed, including—

“(A) a transaction authorized under section 2371 of title 10, United States Code; and

“(B) a cooperative research and development agreement.

“(2) The term ‘party’, with respect to a non-FAR agreement, means a non-Federal entity and includes any of the following:

“(A) A contractor and its subcontractors (at any tier).

“(B) A joint venture.

“(C) A consortium.

“(d) REPORT ON LIFE CYCLE PLANNING FOR TECHNICAL DATA NEEDS.—Not later than 270 days after the date of enactment of this Act [Oct. 14, 2008], the Secretary of Defense shall submit to the Committees on Armed Services of the Senate and the House of Representatives a report on the implementation of the requirements in section 2320(e) of title 10, United States Code, for the assessment of long-term technical data needs to sustain major weapon systems. Such report shall include—

“(1) a description of all relevant guidance or policies issued;

“(2) a description of the extent to which program managers have received training to better assess the long-term technical data needs of major weapon systems and subsystems; and

“(3) a description of one or more examples, if any, where a priced contract option has been used on major weapon systems for the future delivery of technical data and one or more examples, if any, where all relevant technical data were acquired upon contract award.”

GOVERNMENT-INDUSTRY COMMITTEE ON RIGHTS IN TECHNICAL DATA

Pub. L. 102-190, div. A, title VIII, §807, Dec. 5, 1991, 105 Stat. 1421, as amended by Pub. L. 102-484, div. A, title VIII, §814, Oct. 23, 1992, 106 Stat. 2454; Pub. L. 105-85, div. A, title X, §1073(d)(3), Nov. 18, 1997, 111 Stat. 1905, provided that not later than Sept. 15, 1992, the Secretary of Defense was to prescribe final regulations required by subsec. (a) of this section that supersede the interim regulations prescribed before Dec. 5, 1991, for the purposes of this section and contained various provisions relating to a government-industry advisory committee, reports to Congress, publication of the regulations, and application of the regulations.

CONTROL OF GOVERNMENT PERSONNEL WORK PRODUCT

Pub. L. 102-190, div. A, title VIII, §808, Dec. 5, 1991, 105 Stat. 1423, required Secretary of Defense to prescribe

regulations ensuring that any Department of Defense employee or member of the armed forces with an appropriate security clearance who is engaged in oversight of an acquisition program maintains control of the employee's or member's work product, provided that procedures for protecting unauthorized disclosure of classified information by contractors do not require such an employee or member to relinquish control of his or her work product to any such contractor, required implementing regulations not later than 120 days after Dec. 5, 1991, and provided that this section would cease to be effective on Sept. 30, 1992.

§ 2321. Validation of proprietary data restrictions

(a) CONTRACTS COVERED BY SECTION.—This section applies to any contract for supplies or services entered into by the Department of Defense that includes provisions for the delivery of technical data.

(b) CONTRACTOR JUSTIFICATION FOR RESTRICTIONS.—A contract subject to this section shall provide that a contractor under the contract and any subcontractor under the contract at any tier shall be prepared to furnish to the contracting officer a written justification for any use or release restriction (as defined in subsection (i)) asserted by the contractor or subcontractor.

(c) REVIEW OF RESTRICTIONS.—(1) The Secretary of Defense shall ensure that there is a thorough review of the appropriateness of any use or release restriction asserted with respect to technical data by a contractor or subcontractor at any tier under a contract subject to this section.

(2) The review of an asserted use or release restriction under paragraph (1) shall be conducted before the end of the three-year period beginning on the later of—

(A) the date on which final payment is made on the contract under which the technical data is required to be delivered; or

(B) the date on which the technical data is delivered under the contract.

(d) CHALLENGES TO RESTRICTIONS.—(1) The Secretary of Defense may challenge a use or release restriction asserted with respect to technical data by a contractor or subcontractor at any tier under a contract subject to this section if the Secretary finds that—

(A) reasonable grounds exist to question the current validity of the asserted restriction; and

(B) the continued adherence by the United States to the asserted restriction would make it impracticable to procure the item to which the technical data pertain competitively at a later time.

(2)(A) A challenge to a use or release restriction asserted by the contractor in accordance with applicable regulations may not be made under paragraph (1) after the end of the six-year period described in subparagraph (B) unless the technical data involved—

(i) are publicly available;

(ii) have been furnished to the United States without restriction;

(iii) have been otherwise made available without restriction; or

(iv) are the subject of a fraudulently asserted use or release restriction.

(B) The six-year period referred to in subparagraph (A) is the six-year period beginning on the later of—

- (i) the date on which final payment is made on the contract under which the technical data are required to be delivered; or
- (ii) the date on which the technical data are delivered under the contract.

(3) If the Secretary challenges an asserted use or release restriction under paragraph (1), the Secretary shall provide written notice of the challenge to the contractor or subcontractor asserting the restriction. Any such notice shall—

- (A) state the specific grounds for challenging the asserted restriction;
- (B) require a response within 60 days justifying the current validity of the asserted restriction; and
- (C) state that evidence of a justification described in paragraph (4) may be submitted.

(4) It is a justification of an asserted use or release restriction challenged under paragraph (1) that, within the three-year period preceding the challenge to the restriction, the Department of Defense validated a restriction identical to the asserted restriction if—

- (A) such validation occurred after a challenge to the validated restriction under this subsection; and
- (B) the validated restriction was asserted by the same contractor or subcontractor (or a licensee of such contractor or subcontractor).

(e) **TIME FOR CONTRACTORS TO SUBMIT JUSTIFICATIONS.**—If a contractor or subcontractor asserting a use or release restriction submits to the contracting officer a written request, showing the need for additional time to comply with the requirement to justify the current validity of the asserted restriction, additional time to adequately permit the submission of such justification shall be provided by the contracting officer as appropriate. If a party asserting a restriction receives notices of challenges to restrictions on technical data from more than one contracting officer, and notifies each contracting officer of the existence of more than one challenge, the contracting officer initiating the first in time challenge, after consultation with the party asserting the restriction and the other contracting officers, shall formulate a schedule of responses to each of the challenges that will afford the party asserting the restriction with an equitable opportunity to respond to each such challenge.

(f) **PRESUMPTION OF DEVELOPMENT EXCLUSIVELY AT PRIVATE EXPENSE.**—In the case of a challenge to a use or release restriction that is asserted with respect to technical data of a contractor or subcontractor under a contract for commercial products, the contracting officer shall presume that the contractor or subcontractor has justified the restriction on the basis that commercial products was¹ developed exclusively at private expense, whether or not the contractor or subcontractor submits a justification in response to the notice provided pursuant to subsection (d)(3). In such a case, the challenge to the use or release restriction may

be sustained only if information provided by the Department of Defense demonstrates that commercial products was¹ not developed exclusively at private expense.

(g) **DECISION BY CONTRACTING OFFICER.**—(1) Upon a failure by the contractor or subcontractor to submit any response under subsection (d)(3), the contracting officer shall issue a decision pertaining to the validity of the asserted restriction.

(2) After review of any justification submitted in response to the notice provided pursuant to subsection (d)(3), the contracting officer shall, within 60 days of receipt of any justification submitted, issue a decision or notify the party asserting the restriction of the time within which a decision will be issued.

(h) **CLAIMS.**—If a claim pertaining to the validity of the asserted restriction is submitted in writing to a contracting officer by a contractor or subcontractor at any tier, such claim shall be considered a claim within the meaning of chapter 71 of title 41.

(i) **RIGHTS AND LIABILITY UPON FINAL DISPOSITION.**—(1) If, upon final disposition, the contracting officer's challenge to the use or release restriction is sustained—

- (A) the restriction shall be cancelled; and
- (B) if the asserted restriction is found not to be substantially justified, the contractor or subcontractor asserting the restriction shall be liable to the United States for payment of the cost to the United States of reviewing the asserted restriction and the fees and other expenses (as defined in section 2412(d)(2)(A) of title 28) incurred by the United States in challenging the asserted restriction, unless special circumstances would make such payment unjust.

(2) If, upon final disposition, the contracting officer's challenge to the use or release restriction is not sustained—

- (A) the United States shall continue to be bound by the restriction; and
- (B) the United States shall be liable for payment to the party asserting the restriction for fees and other expenses (as defined in section 2412(d)(2)(A) of title 28) incurred by the party asserting the restriction in defending the asserted restriction if the challenge by the United States is found not to be made in good faith.

(j) **USE OR RELEASE RESTRICTION DEFINED.**—In this section, the term “use or release restriction”, with respect to technical data delivered to the United States under a contract subject to this section, means a restriction by the contractor or subcontractor on the right of the United States—

- (1) to use such technical data; or
- (2) to release or disclose such technical data to persons outside the Government or permit the use of such technical data by persons outside the Government.

(Added Pub. L. 98-525, title XII, §1216(a), Oct. 19, 1984, 98 Stat. 2597; amended Pub. L. 99-500 §101(c) [title X, §953(b)], Oct. 18, 1986, 100 Stat. 1783-82, 1783-171, and Pub. L. 99-591, §101(c) [title X, §953(b)], Oct. 30, 1986, 100 Stat. 3341-82, 3341-171; Pub. L. 99-661, div. A, title IX, formerly title IV,

¹ So in original.

§ 953(b), Nov. 14, 1986, 100 Stat. 3951, renumbered title IX, Pub. L. 100-26, § 3(5), Apr. 21, 1987, 101 Stat. 273, Pub. L. 100-26, § 7(a)(5), Apr. 21, 1987, 101 Stat. 276; Pub. L. 100-180, div. A, title XII, § 1231(6), Dec. 4, 1987, 101 Stat. 1160; Pub. L. 103-35, title II, § 201(g)(4), May 31, 1993, 107 Stat. 100; Pub. L. 103-355, title VIII, § 8106(b), Oct. 13, 1994, 108 Stat. 3393; Pub. L. 109-364, div. A, title VIII, § 802(b), Oct. 17, 2006, 120 Stat. 2313; Pub. L. 110-181, div. A, title VIII, § 815(a)(2), Jan. 28, 2008, 122 Stat. 223; Pub. L. 111-350, § 5(b)(18), Jan. 4, 2011, 124 Stat. 3844; Pub. L. 111-383, div. A, title VIII, § 824(c), Jan. 7, 2011, 124 Stat. 4269; Pub. L. 112-81, div. A, title VIII, § 815(b), Dec. 31, 2011, 125 Stat. 1492; Pub. L. 113-291, div. A, title X, § 1071(a)(5), Dec. 19, 2014, 128 Stat. 3504; Pub. L. 114-92, div. A, title VIII, § 813(a), Nov. 25, 2015, 129 Stat. 891; Pub. L. 115-232, div. A, title VIII, §§ 836(c)(8), 865, 866(a), Aug. 13, 2018, 132 Stat. 1866, 1901; Pub. L. 116-92, div. A, title VIII, § 808(b), Dec. 20, 2019, 133 Stat. 1486.)

CODIFICATION

Pub. L. 99-591 is a corrected version of Pub. L. 99-500. Another section 2321 of this title was contained in chapter 138 and was renumbered section 2341 of this title.

AMENDMENTS

2019—Subsec. (i). Pub. L. 116-92 restored text of subsec. (i) resulting in amendment by section 866(a) of Pub. L. 115-232 having no effect. See 2018 Amendment note below.

2018—Subsec. (f). Pub. L. 115-232, § 865, struck out par. (1) designation, substituted “In” for “Except as provided in paragraph (2), in”, and struck out par. (2) which related to a challenge to a use or release restriction regarding technical data for a major weapon system, subsystem, or component developed exclusively at private expense.

Pub. L. 115-232, § 836(c)(8)(B), which directed the amendment of par. (2)(A) by substituting “commercial product” for “commercial item” in cls. (i) and (ii), could not be executed because of the intervening amendment by Pub. L. 115-232, § 865, which struck out par. (2) and was effective earlier. See above.

Pub. L. 115-232, § 836(c)(8)(A), which directed the amendment of par. (1) by substituting “commercial products” for “commercial items” and, in two places, “commercial products” for “the item”, was executed to subsec. (f) to reflect the probable intent of Congress and the intervening amendment by Pub. L. 115-232, § 865, which struck out the par. (1) designation and was effective earlier. See above. Of the three resulting occurrences of “commercial products”, the first is from the first substitution, and the second and third are from the second substitution.

Subsec. (i). Pub. L. 115-232, § 866(a), inserted “Prior to and” after “Rights and Liability” in heading, added par. (1), and redesignated former pars. (1) and (2) as (2) and (3), respectively.

2015—Subsec. (f)(2). Pub. L. 114-92 amended par. (2) generally. Prior to amendment, par. (2) read as follows: “In the case of a challenge to a use or release restriction that is asserted with respect to technical data of a contractor or subcontractor (other than technical data for a commercially available off-the-shelf item as defined in section 104 of title 41) for a major system or a subsystem or component thereof on the basis that the major system, subsystem or component was developed exclusively at private expense, the challenge to the use or release restriction shall be sustained unless information provided by the contractor or subcontractor demonstrates that the item was developed exclusively at private expense.”

2014—Subsec. (f)(2). Pub. L. 113-291 substituted “section 104 of title 41” for “section 35(c) of the Office of Federal Procurement Policy Act (41 U.S.C. 431(c))”.

2011—Subsec. (d)(2)(A). Pub. L. 112-81, § 815(b)(1)(A), substituted “A challenge to a use or release restriction asserted by the contractor in accordance with applicable regulations may not be made under paragraph (1) after the end of the six-year period” for “Except as provided in subparagraph (C), a challenge to an asserted use or release restriction may not be made under paragraph (1) after the end of the three-year period” in introductory provisions.

Pub. L. 111-383, § 824(c)(1), substituted “Except as provided in subparagraph (C), a challenge” for “A challenge” in introductory provisions.

Subsec. (d)(2)(A)(iv). Pub. L. 112-81, § 815(b)(1)(B)–(D), added cl. (iv).

Subsec. (d)(2)(B). Pub. L. 112-81, § 815(b)(2), substituted “six-year period” for “three-year period” in two places in introductory provisions.

Subsec. (d)(2)(C). Pub. L. 112-81, § 815(b)(3), struck out subpar. (C) which read as follows: “The limitation in this paragraph shall not apply to a case in which the Secretary finds that reasonable grounds exist to believe that a contractor or subcontractor has erroneously asserted a use or release restriction with regard to technical data described in section 2320(a)(2)(A) of this title.”

Pub. L. 111-383, § 824(c)(2), added subpar. (C).

Subsec. (h). Pub. L. 111-350 substituted “chapter 71 of title 41” for “the Contract Disputes Act of 1978 (41 U.S.C. 601 et seq.)”.

2008—Subsec. (f)(2). Pub. L. 110-181 substituted “(other than technical data for a commercially available off-the-shelf item as defined in section 35(c) of the Office of Federal Procurement Policy Act (41 U.S.C. 431(c)))” for “(whether or not under a contract for commercial items)”.

2006—Subsec. (f). Pub. L. 109-364 substituted “Expense” for “Expense for Commercial Items Contracts” in heading, designated existing provisions as par. (1), substituted “Except as provided in paragraph (2), in” for “In”, and added par. (2).

1994—Subsecs. (f) to (j). Pub. L. 103-355 added subsec. (f) and redesignated former subsecs. (f) to (i) as (g) to (j), respectively.

1993—Subsec. (d)(1)(B). Pub. L. 103-35 substituted “adherence” for “adherence”.

1987—Subsec. (a). Pub. L. 100-26, § 7(a)(5)(A)(ii), added subsec. (a) and struck out former subsec. (a) which read as follows: “A contract for supplies or services entered into by the Department of Defense which provides for the delivery of technical data shall provide that a contractor or subcontractor at any tier shall be prepared to furnish to the contracting officer a written justification for any restriction asserted by the contractor or subcontractor on the right of the United States to use such technical data.”

Subsec. (b). Pub. L. 100-26, § 7(a)(5)(A)(ii), added subsec. (b) and struck out former subsec. (b) which read as follows:

“(1) The Secretary of Defense shall ensure that there is a thorough review of the appropriateness of any restriction on the right of the United States to release or disclose technical data delivered under a contract to persons outside the Government, or to permit the use of such technical data by such persons. Such review shall be conducted before the end of the three-year period beginning on the date on which final payment is made on a contract under which technical data is required to be delivered, or the date on which the technical data is delivered under such contract, whichever is later.

“(2)(A) If the Secretary determines, at any time before the end of the three-year period beginning on the date on which final payment is made on a contract under which technical data is required to be delivered, or the date on which the technical data is delivered under such contract, whichever is later, that a challenge to a restriction is warranted, the Secretary shall provide written notice to the contractor or subcontractor asserting the restriction. Such a determination shall be based on a finding by the Secretary that rea-

sonable grounds exist to question the current validity of the asserted restriction and that the continued adherence to the asserted restriction by the United States would make it impracticable to procure the item competitively at a later time. Such notice shall—

“(i) state the specific grounds for challenging the asserted restriction;

“(ii) require a response within 60 days justifying the current validity of the asserted restriction; and

“(iii) state that evidence of a validation by the Department of Defense of a restriction identical to the asserted restriction within the three-year period preceding the challenge shall serve as justification for the asserted restriction if—

“(I) the validation occurred after a review of the validated restriction under this subsection; and

“(II) the validated restriction was asserted by the same contractor or subcontractor (or any licensee of such contractor or subcontractor) to which such notice is being provided.

“(B) Notwithstanding subparagraph (A), the United States may challenge a restriction on the release, disclosure, or use of technical data delivered under a contract at any time if such technical data—

“(i) is publicly available;

“(ii) has been furnished to the United States without restriction; or

“(iii) has been otherwise made available without restriction.”

Subsec. (c). Pub. L. 100-26, §7(a)(5)(A)(ii), added subsec. (c). Former subsec. (c) redesignated (e).

Subsec. (d). Pub. L. 100-26, §7(a)(5)(A)(ii), added subsec. (d). Former subsec. (d) redesignated (f).

Subsec. (d)(4)(A). Pub. L. 99-180, §1231(6)(A), substituted “subsection” for “paragraph”.

Subsec. (e). Pub. L. 100-26, §7(a)(5)(A)(i), (B), redesignated former subsec. (c) as (e), inserted heading, and substituted “If a contractor or subcontractor asserting a use or release restriction” for “If a contractor or subcontractor asserting a restriction subject to this section”. Former subsec. (e) redesignated (g).

Subsec. (f). Pub. L. 100-26, §7(a)(5)(A)(i), (C), redesignated former subsec. (d) as (f), inserted heading, and substituted “subsection (d)(3)” for “subsection (b)” in two places. Former subsec. (f) redesignated (h).

Subsec. (g). Pub. L. 100-26, §7(a)(5)(A)(i), (D), redesignated former subsec. (e) as (g) and inserted heading.

Subsec. (h). Pub. L. 100-26, §7(a)(5)(A)(i), (E)(i), redesignated former subsec. (f) as (h) and inserted heading.

Subsec. (h)(1). Pub. L. 100-26, §7(a)(5)(E)(ii)-(iv), substituted “the use or release restriction” for “the restriction on the right of the United States to use such technical data” in introductory provisions, struck out “on the right of the United States to use the technical data” after “the restriction” in subpar. (A), and substituted “asserting the restriction” for “, as appropriate,” in subpar. (B).

Subsec. (h)(2). Pub. L. 100-26, §7(a)(5)(E)(v), substituted “the use or release restriction” for “the restriction on the right of the United States to use such technical data” in introductory provisions.

Subsec. (i). Pub. L. 100-180, §1231(6)(B), inserted “or subcontractor” in introductory provisions.

Pub. L. 100-26, §7(a)(5)(F), added subsec. (i).

1986—Subsecs. (a), (b). Pub. L. 99-500, Pub. L. 99-591, and Pub. L. 99-661 amended generally subsecs. (a) and (b) identically. Prior to amendment, subsecs. (a) and (b) read as follows:

“(a) A contract for supplies or services entered into by the Department of Defense which provides for the delivery of technical data shall provide that—

“(1) a contractor or subcontractor at any tier shall be prepared to furnish to the contracting officer a written justification for any restriction asserted by the contractor or subcontractor on the right of the United States to use such technical data; and

“(2) the contracting officer may review the validity of any restriction asserted by the contractor or by a subcontractor under the contract on the right of the United States to use technical data furnished to the

United States under the contract if the contracting officer determines that reasonable grounds exist to question the current validity of the asserted restriction and that the continued adherence to the asserted restriction by the United States would make it impracticable to procure the item competitively at a later time.

“(b) If after such review the contracting officer determines that a challenge to the asserted restriction is warranted, the contracting officer shall provide written notice to the contractor or subcontractor asserting the restriction. Such notice shall—

“(1) state the grounds for challenging the asserted restriction; and

“(2) require a response within 60 days justifying the current validity of the asserted restriction.”

EFFECTIVE DATE OF 2018 AMENDMENT

Amendment by section 836(c)(8) of Pub. L. 115-232 effective Jan. 1, 2020, subject to a savings provision, see section 836(h) of Pub. L. 115-232, set out as an Effective Date of 2018 Amendment; Savings Provision note under section 453b of Title 6, Domestic Security.

Pub. L. 115-232, div. A, title VIII, §866(c), Aug. 13, 2018, 132 Stat. 1901, which provided the effective date and applicability for amendments made to this section by section 866(a) of Pub. L. 115-232 and revisions required by section 866(b) of Pub. L. 115-232 (formerly set out below), was repealed by Pub. L. 116-92, div. A, title VIII, §808(a), Dec. 20, 2019, 133 Stat. 1486.

EFFECTIVE DATE OF 1994 AMENDMENT

For effective date and applicability of amendment by Pub. L. 103-355, see section 10001 of Pub. L. 103-355, set out as a note under section 2302 of this title.

EFFECTIVE DATE OF 1987 AMENDMENT

Pub. L. 100-26, §12(d)(1), Apr. 21, 1987, 101 Stat. 289, provided that: “The amendments to section 2321 of title 10, United States Code, made by section 7(a)(5) shall apply to contracts for which solicitations are issued after the end of the 210-day period beginning on October 18, 1986.”

EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by Pub. L. 99-500, Pub. L. 99-591, and Pub. L. 99-661 applicable to contracts for which solicitations are issued after end of 210-day period beginning Oct. 18, 1986, see section 101(c) of Pub. L. 99-500 and Pub. L. 99-591, and section 953(e) of Pub. L. 99-661, set out as a note under section 2320 of this title.

EFFECTIVE DATE

Section applicable with respect to solicitations issued after the end of the one-year period beginning Oct. 19, 1984, see section 1216(c)(2) of Pub. L. 98-525, set out as a note under section 2319 of this title.

REVISION OF THE DEFENSE FEDERAL ACQUISITION REGULATION SUPPLEMENT

Pub. L. 115-232, div. A, title VIII, §866(b), Aug. 13, 2018, 132 Stat. 1901, which required the Secretary of Defense to revise the Defense Federal Acquisition Regulation Supplement to implement amendments to this section made by section 866(a) of Pub. L. 115-232, was repealed by Pub. L. 116-92, div. A, title VIII, §808(a), Dec. 20, 2019, 133 Stat. 1486.

GUIDANCE ON TECHNICAL DATA RIGHT NEGOTIATION

Pub. L. 115-232, div. A, title VIII, §866(d), Aug. 13, 2018, 132 Stat. 1901, which required the Secretary of Defense to develop certain policies on the negotiation of technical data rights for noncommercial software, was repealed by Pub. L. 116-92, div. A, title VIII, §808(a), Dec. 20, 2019, 133 Stat. 1486.

§ 2322. Management of intellectual property matters within the Department of Defense

(a) POLICY REQUIRED.—The Secretary of Defense, acting through the Under Secretary of De-